(2)

No. 89-200

OCT 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

MENDEL E. OFMAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

MARC RICHMAN
RUSSELL CAPLAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was entitled to reinstatement in the Army, with back pay and constructive credit, even though he declined to accept the Army's offer of a 90-day extension of service in which to apply for a waiver of disqualification.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Fitzgerald v. *Hampton*, 467 F.2d 755 (D.C. Cir. 1972)	5
Goldman v. *Weinberger*, 475 U.S. 503 (1986)	6
Orloff v. *Willoughby*, 345 U.S. 83 (1953)	6
Parker v. *Levy*, 417 U.S. 733 (1974)	6
Paroczay v. *Hodges*, 297 F.2d 439 (D.C. Cir. 1961)	5
Reaves v. *Ainsworth*, 219 U.S. 296 (1911)	6
Schultz v. *United States Navy*, 810 F.2d 1133 (Fed. Cir. 1987)	5
Stone v. *University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988)	5

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-200

MENDEL E. OFMAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is unpublished, but the decision is noted at 872 F.2d 1021 (Table). The judgment of the district court (Pet. App. 6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1989. A petition for rehearing was denied on March 27, 1989 (Pet. App. 1a-2a). On

June 23, 1989, Justice Marshall extended the time within which to file the petition for a writ of certiorari to and including July 25, 1989; on July 18, 1989, Justice Marshall granted a further extension to and including August 4, 1989 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1979, while stationed in Korea, petitioner received nonjudicial punishment for alleged black market activity. He was reduced one grade, from E6 to E5, and fined $150. Pet. App. 14a. In November 1979, petitioner's term of enlistment expired, but petitioner remained on active duty for an additional few months pending completion of a criminal investigation. Pet. 7-8. The Army classified him as eligible for reenlistment, but, because of his reduction in rank, he was subject to a grade disqualification. He could therefore reenlist not less than 93 days after discharge and only at a lower grade, E4. Pet. 8-9; Pet. App. 14a. The Army offered him a 90-day extension of service in which to request a waiver of grade disqualification. Pet. 8. Rather than accepting the 90-day extension and seeking a waiver of grade disqualification, petitioner received an honorable discharge and left the Army on March 5, 1980. Pet. 8-9; Pet. App. 14a.

2. In 1982, petitioner applied to the Army Board for Correction of Military Records (ABCMR), maintaining his innocence and seeking various remedies. The ABCMR asked petitioner to take a polygraph test, but he refused. Pet. 9-10. In 1984, petitioner filed suit against the United States, the Secretary of the Army, and the ABCMR. The following year,

after some initial judicial proceedings, petitioner took and passed the polygraph test provided by the ABCMR. Pet. 10. In response, after receiving an analysis from the Office of Judge Advocate General, the ABCMR concluded that "[i]n retrospect, and based on newly presented evidence, not previously available to the Board, it appears that the imposition of punishment on 19 June 1979 was unjust." Pet. App. 16a. The Board recommended (1) that Army records be corrected by removing a report of petitioner's punishment and all references to it; (2) that the $150 fine be refunded to petitioner; and (3) that petitioner's E6 grade be restored. *Ibid*; Pet. 16. The Board concluded, however, that petitioner was not entitled to be restored to active duty, with full credit retroactive to March 1980; it reasoned that petitioner had terminated his military status and had not applied for reenlistment with a waiver. Pet. App. 15a-16a. Less than three weeks later, the Army implemented the Board's recommendations. Pet. 11. The Army also paid petitioner $1000 to compensate him for the difference in pay between E6 and E5 during the time between his punishment and his discharge. Pet. 16.

3. In petitioner's action against the United States, the Secretary of the Army, and the ABCMR, the district court granted summary judgment for defendants. Pet. App. 6a. In a hearing on the summary judgment motion, the district court noted that petitioner had taken the "[lie] detector test and * * * got[ten] remedy from the government as a result." Pet. App. 10a. In response to the suggestion by petitioner's counsel that petitioner was "deprived of reenlistment," the court stated that petitioner "never applied for a waiver" and that he thus "waived his

right." *Ibid.* The court further observed that it would not order the Army to reinstate petitioner, that petitioner's skills might have deteriorated, and that a claim for back pay should be directed to the Claims Court. *Id.* at 10a-11a.

4. The court of appeals affirmed (Pet. App. 3a-5a). In an unpublished opinion, the court stated that petitioner had obtained all the relief to which he was entitled. Noting that it had no power to order the Army to grant petitioner's reenlistment, the court found no error in the district court's refusal either to give petitioner constructive credit for active service since 1980 or to order the Army to reconsider reinstatement. The court of appeals concluded that both the district court and the Army were justified in viewing petitioner's failure to obtain an extension of service and apply for a waiver of grade disqualification as a waiver of his right to seek reenlistment without such a disqualification. *Id.* at 4a-5a.

ARGUMENT

1. Petitioner contends (Pet. 15-20) that the court of appeals' decision conflicts with decisions from other courts of appeals regarding "the issue of how 'involuntary or coerced resignations' are to be treated on motions for summary judgment." Pet. 15. No such conflict exists.

As an initial matter, petitioner's statement that the court of appeals relied simply on the government's " 'stated reason' " (Pet. 16) for his separation from the Army is incorrect.[1] Instead, the court relied on

[1] Despite petitioner's repeated use of the phrase " 'stated reason' " in characterizing the court of appeals' analysis (Pet. 16, 17, 18, 19), that term never appears in the court of appeals' opinion.

the fact that "[i]t is undisputed that Ofman had an opportunity in 1980 to seek an extension of his Army service in order to apply for reenlistment and that he elected not to do so." Pet. App. 4a-5a. That fact remains undisputed; petitioner's contention is that his decision not to accept the offered 90-day extension to seek a waiver was justified by his view that it would have been fruitless to seek such a waiver. See, *e.g.*, Pet. 8. Consequently, unlike the situation in the "coerced resignation" cases cited by petitioner (Pet. 17-18), petitioner's claim is not that he was faced with a choice of immediate resignation or future adverse consequences.[2] Petitioner does not advance, and the record does not support, a claim that, unless he left the military immediately (without accepting the 90-day extension), he would be in a *worse* position, and that his decision not to accept the offered 90-day extension and to seek a waiver should be deemed involuntary and not given effect.[3] Thus the court of

---

[2] See *Stone* v. *University of Maryland Medical System Corp.*, 855 F.2d 167, 177 (4th Cir. 1988) (employee's "argument is, in essence, that he was forced to make the * * * difficult decision whether to resign or face termination proceedings"); *Schultz* v. *United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (employee submitted resignation "to avoid an adverse action"); *Paroczay* v. *Hodges*, 297 F.2d 439, 441 (D.C. Cir. 1961) (employee maintained that he was "faced * * * with being charged with serious misconduct unless he resigned then and there"). In the fourth case cited by petitioner (*Fitzgerald* v. *Hampton*, 467 F.2d 755 (D.C. Cir. 1972)), the employee claimed that a reduction in force was a pretext for a retaliatory discharge; the court of appeals concluded that the standards in the coerced resignation cases were applicable. *Id.* at 759.

[3] Petitioner maintains (Pet. 18) that in November 1979, he requested a waiver, but his request was ignored. As the Office

appeals properly relied on an undisputed fact that distinguishes petitioner's claim from the "coerced resignation" cases he relies upon.[4]

Petitioner's situation is also different from that of the plaintiffs in those cases because his claim, unlike theirs, arises in a military reenlistment context. The difference is significant. This Court has frequently emphasized that the military is entitled to judicial deference in carrying out its mission.[5] As the court of appeals observed, "[a] member of the United States armed forces has no constitutionally protected property or liberty interest in continuing in military service." Pet. App. 4a. Indeed, petitioner himself recognizes that "a soldier's expectations in continued employment are different than a civilian's expectation in continued employment." Pet. 25.

2. Petitioner also contends (Pet. 20-24) that he was ineligible for a waiver, and thus any suggestion that he should have applied for a waiver is contrary

---

of Judge Advocate General found, however, even if this request was made, petitioner cannot rely on it because the offer of a 90-day extension in which to seek a waiver was made after that event. Pet. App. 20a-21a.

[4] In the court of appeals, petitioner did not cite any of the "coerced resignation" cases on which he now relies. Instead, petitioner argued that the ABCMR's decision was "arbitrary and capricious and unsupported by substantial evidence" (Pet. C.A. Br. 19; *id.* at 19-24), and that the district court was incorrect about both the utility of petitioner's skills (*id.* at 10-18) and the availability of the Claims Court (*id.* at 29-31).

[5] See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503, 507-508 (1986); *Parker* v. *Levy*, 417 U.S. 733, 743-744 (1974); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953); *Reaves* v. *Ainsworth*, 219 U.S. 296, 306 (1911).

to law. As petitioner recognizes (Pet. 22-23, nn. 9-11), this argument—that his perception of the futility of applying for a waiver justified refusal to accept the Army's offer—has been rejected by the Office of Judge Advocate General, the ABCMR, the district court, and the court of appeals. Petitioner asserts a due process right to have his subjective reading of the regulation take precedence over the Army's request that it be given a chance to address the possibility of a waiver in a formal application and an orderly proceeding. There is no support in logic or precedent for such a claim, and petitioner cites no authority for his contention.

3. Finally, petitioner argues (Pet. 24-26) that his right to due process was violated because he was denied a remedy. However, petitioner has obtained significant remedies—the correction of his records, the refund of his fine, and compensation for the reduction of his grade. Although petitioner maintains that he was denied reinstatement, constructive credit, and back pay (Pet. 25), he emphasized in the court of appeals that the only requested judicial relief was a rejection of the ABCMR opinion and either an order awarding him constructive credit or a remand to the ABCMR for further consideration.[6] The court of appeals affirmed the refusal of this additional relief because it found no error in the reliance by the

---

[6] See Pet. C.A. Reply Br. 2-4, 11-13. Partly to avoid jurisdictional problems, petitioner stressed in the court of appeals that he did not seek a monetary award from the court. See *id.* at 3-4 ("Mr. Ofman has repeatedly and unambiguously disavowed a claim for a money judgment. If he prevails on his * * * claim, he will be entitled to relief that will have monetary sequelae, but no judicial involvement is needed to secure those sequelae." (footnote omitted)).

district court and the ABCMR on petitioner's undisputed refusal to accept the extension and apply for a waiver. Pet. App. 4a-5a. The court of appeals' conclusion regarding the waiver was correct, and, in any event, this case-specific determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

MARC RICHMAN
RUSSELL CAPLAN
Attorneys

OCTOBER 1989

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 241699 539